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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

410
No.
Criminal.

LOUIS H. EGAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

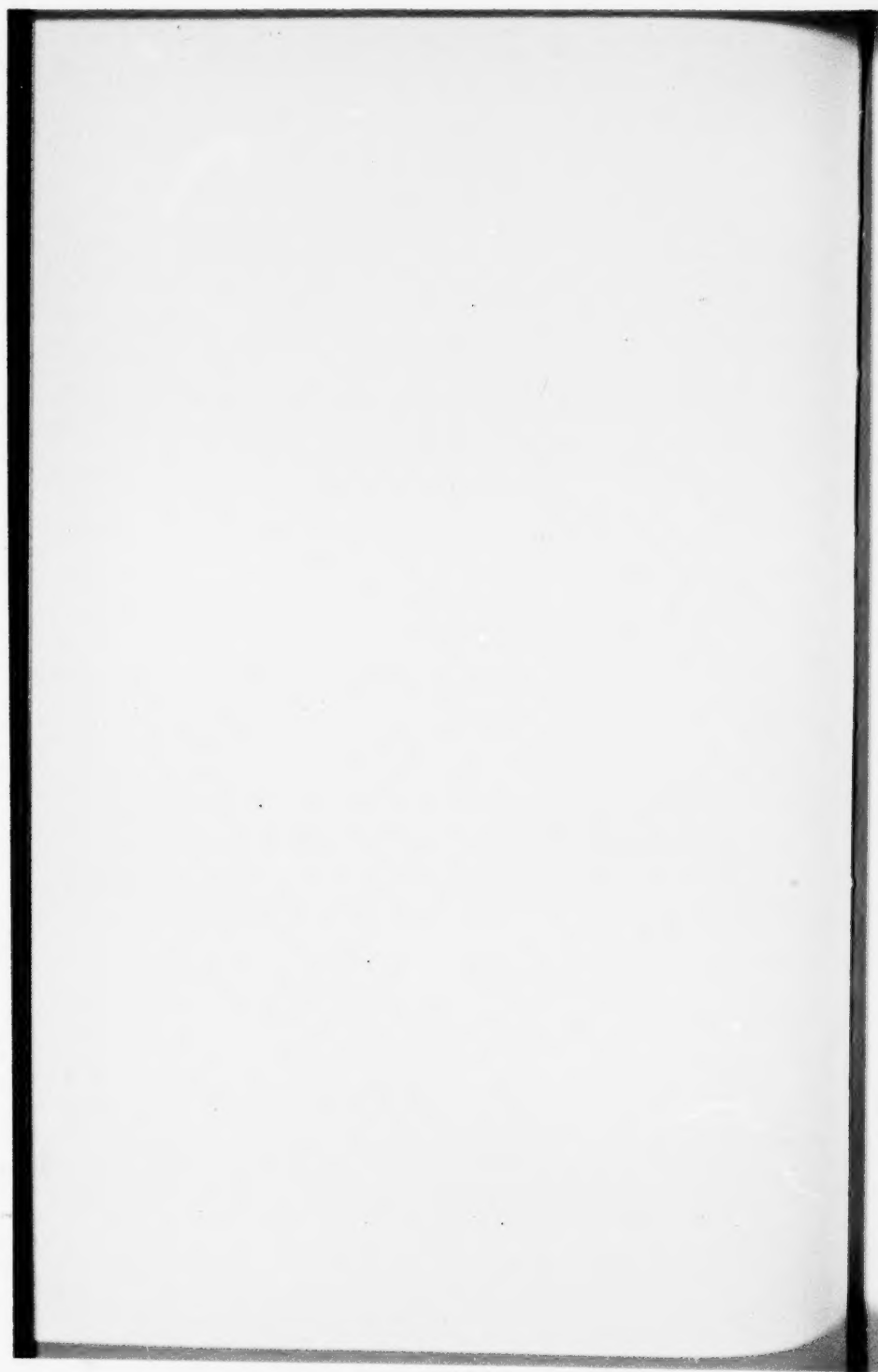
To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

THOMAS BOND,
Attorney for Petitioner.

October 2, 1943.



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PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit.

Louis H. Egan prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled case on August 9, 1943, affirming the judgment of the District Court of the United States for the Eastern District of Missouri. The said judgment became final on September 9, 1943, when the said Court without opinion denied petitioner's petition for a rehearing (R. 1278).

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is unreported as yet. It will be found at page 1231 of the record herein.

STATUTES INVOLVED.

The statute involved (hereinafter called the Act) is Title I of the Public Utility Act of 1935 entitled, "An Act to Provide for Control and Regulation of Public Utility Holding Companies, and for Other Purposes" (49 Stat. 803, Title 15, U. S. C. A., Sec. 79). The indictment charges conspiracy (Title 18, U. S. C. A., Sec. 88) to violate Sec. 12-H [Title 15, U. S. C. A., Sec. 79-L (h)] of the aforesaid Public Utility Act of 1935. Section 12-H reads as follows:

"It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—

"(1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

"(2) to make any contribution to or in support of any political party or any committee or agency thereof.

"The term 'contribution,' as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution."

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, Title 28, U. S. C. A., Sec. 347, and the Act of March 8, 1934, relating to criminal cases, Title 28, U. S. C. A., Sec. 723-a, also 18 U. S. C. A., Sec. 688, and Rule XI promulgated pursuant thereto). See cases cited under Reasons for Granting the Writ, page 8.

QUESTIONS PRESENTED.

1. Is section 12-H of the act a valid exercise of the power of Congress, under Article I, Section 8, Clause 3 of the Constitution, to regulate commerce among the several states?

2. Under the doctrine of separability, can any part of section 12-H be upheld?

3. Can the language of section 12-H be enlarged by construction to include contributions made to persons not candidates for office, but "made in contemplation of such persons becoming candidates," and was it error for the Court to so charge the jury (R. 1258, 161, 1187)?

4. Is the Court of Appeals' opinion, upon the sufficiency of the evidence (R. 1239-47), untenable and in conflict with the decisions in other circuits?

5. Did the Court err in refusing petitioner's requested instruction No. 14, thereby refusing to submit petitioner's theory on a disputed issue of fact (R. 1257, 160, 1175)?

6. Was Mortimer's testimony as to petitioner's expense account (which the court below held to have been erroneously received [R. 1253-4]) prejudicial (R. 80, 782-3)?

7. Was evidence of the political practices of North American Light & Power Company, with which petitioner was not connected, admissible against petitioner (R. 123, 1001-4)?

8. When Spoehrer's ex parte affidavit confessing his part in the alleged conspiracy (Govt. Exh. No. 70, R. 821-7) was read in petitioner's presence, did petitioner's mere silence make the affidavit admissible in evidence against him (R. 1252-3, 70, 441-3)?

STATEMENT.

Petitioner was indicted January 17, 1941, in the Eastern District of Missouri, jointly with Union Electric Company of Missouri, upon eight counts, count 1 charging conspiracy to violate section 12-H quoted supra, and counts 2 to 8 charging specific violations of said section (R. 16-31). Over petitioner's objection, the defendants were tried jointly and petitioner was acquitted on counts 2 to 8, but convicted on count 1. The defendant Union Electric Company of Missouri was convicted on all counts. Petitioner was sentenced by the District Court to two years imprisonment and to pay a fine of \$10,000, and this judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, in the opinion and judgment here sought to be reviewed.

The Union Electric Company of Missouri and petitioner prosecuted separate appeals to the United States Circuit Court of Appeals for the Eighth Circuit. The appeals were heard, however, upon a joint record, were argued together, and decided in one opinion (R. 1231). Separate applications to this Court for certiorari are made because the specifications of error differ in some respects.

The constitutionality of section 12-H was duly challenged in the District Court (R. 200, 202, 212, 910, 916, 1200, 1205 and 1206), among other reasons because it was not within the powers granted Congress by the Constitution, and its prohibitions, particularly as to intrastate contributions made locally to candidates for state and sub-state office, and to state committees for state elections, were not within any granted power, and encroached upon the powers reserved to the states. Adverse rulings of the District Court were duly assigned as error and urged on appeal (Egan's Assignments of Error I, R. 68; V, R. 71; VIII, R. 72; XXXIV, R. 152; LVI, R. 166). The Court of

Appeals for the Eighth Circuit held section 12-H to be a valid exercise by Congress of its constitutional power (R. 1239).

In its charge to the jury the District Court permitted them to find that payments of money to persons not at the time candidates for office were in violation of section 12-H if "made in contemplation of such persons becoming candidates for office" (R. 1187). This charge was wholly unsupported by any evidence and was a misconstruction of the statute. Petitioner excepted to it (R. 1195-6) and urged the error on appeal (R. 161), and the Court of Appeals disallowed same (R. 1258).

A question of fact arose at the trial as to whether or not petitioner's contributions to the Republican National Committee were made from a salary paid him by the Union Colliery Company or were from his personal funds. The District Court refused to submit petitioner's theory on this issue to the jury (Egan's refused instruction No. 14, R. 1175), and petitioner urged this error on appeal (R. 160), and this assignment was disallowed (R. 1257).

Against petitioner's objection, Government witness J. D. Mortimer was permitted to testify that F. J. Boehm told him that Egan's expense account was inflated, and that Boehm placed a cross mark over it to so indicate (R. 782-3). The Court of Appeals upheld petitioner's contention that this evidence was inadmissible, but further held that this evidence, attributing, as it did, dishonesty to petitioner, was "favorable rather than prejudicial," and refused to reverse (R. 1253-4).

Other incompetent and irrelevant evidence, with which petitioner was not connected—particularly the former political practices of North American Light & Power Company (R. 1001-4)—the prejudicial character of which was stressed in brief and argument, was not mentioned in the opinion of the Court of Appeals.

An affidavit made by Herman Spoehrer (Govt. Exh. No. 70, R. 821-7) containing conclusions implicating petitioner, was permitted to be read in evidence against petitioner, on a mere showing of petitioner's silence when it was read before a group of six persons, including petitioner (Rec. 441-3), and petitioner's assignment of error on this point was disallowed by the Court of Appeals (R. 1252-3).

Petitioner likewise questioned the sufficiency of the evidence to support the conviction, and the Court of Appeals held the evidence sufficient (R. 1247). In reaching this conclusion the court below applied a test of criminal liability in conspiracy cases that conflicts with decisions in other circuits.

There is no similarity between this case and *Boehm v. U. S.*, 123 Fed. (2d) (8 Cir.) 791, referred to in the opinion below (R. 1241). *Boehm* was not charged with violation or conspiracy to violate section 12-H. He was tried only on the charge of perjury while testifying as a witness before the S. E. C. The Court held that the unconstitutionality of section 12-H was no defense to his perjury, and that he could not raise the question (l. c. 801, pars. 7, 8, and l. c. 809, pars. 20-23). None of the constitutional or other questions here presented were either considered or decided in the *Boehm* case.

Such further facts as are necessary will be stated under Reasons for Granting the Writ and in the argument in the brief supporting this petition.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred

1) in holding that section 12-H of the act is a valid exercise of the power of Congress to regulate commerce among the several states;

2) in failing to hold the portion of the District Court's charge to the jury, permitting them to find payments made to persons not candidates for office, to be in violation of section 12-H, if made in contemplation of such persons becoming candidates, to be erroneous, not supported by the evidence, and reversible error;

3) in failing to hold the refusal of petitioner's requested instruction No. 14 to be reversible error;

4) in failing to hold that the receipt of Mortimer's testimony, concerning petitioner's expense account and Government Exhibit No. 115 (a) (R. 785) in connection therewith, to be prejudicial as well as erroneous;

5) in failing to hold the testimony as to political practices of North American Light & Power Company, to be inadmissible against and prejudicial to petitioner;

6) in failing to hold the admission of the Spoehrer affidavit (Government Exhibit No. 70, R. 821) to be reversible error;

7) in failing to hold the evidence to be insufficient to convict, and in not directing petitioner's discharge.

REASONS FOR GRANTING THE WRIT.

- (1) **This Case Presents Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.**

(a) **The constitutionality of section 12-H.**

Expounding the Constitution is, of course, the highest type of federal law, and such a question is met at the very threshold of this case. The indictment is grounded upon section 12-H, quoted *supra* herein, and, if that section is invalid, the whole prosecution fails. This is a matter of great public importance. It is the first time in its history that Congress has undertaken to regulate political practices pertaining to state and substate elections, and not done through the mails or by any means or instrumentality of interstate commerce.

The section is not confined to federal elections—**U. S. v. Classic**, 313 U. S. 299—nor is it confined to contributions made by mail or by any means or instrumentality of interstate commerce—**U. S. v. Darby**, 312 U. S. 100, syl. 7, l. c. 112-7—nor is it confined to such contributions as may affect interstate commerce—**U. S. v. Wrightwood Dairy Co.**, 315 U. S. 110, l. c. 116. On the contrary, it is an all-inclusive prohibition, including within its comprehensive terms purely intrastate contributions to candidates for state, county and municipal office, or to state or local committees for state or local elections, and there is no declaration in the act, nor any finding by Congress or any administrative agency that the purely local contributions prohibited affect interstate commerce, or that they have any close or substantial relation thereto. We shall endeavor to point out in our brief that Congress is without power to so legislate. We submit that the question of whether or not it has such power is one of great public importance which should be settled by this Court.

When the constitutionality of sections 4(a) and 5 of the act was challenged, this Court considered the question of sufficient importance to warrant certiorari—**Electric Bond & Share Co. et al. v. S. E. C. et al.**, 303 U. S. 419—and, more recently, when the constitutionality of section 11 (b) of the act was challenged, this Court granted certiorari—**The North American Company v. S. E. C.**, October Term, 1942, now pending in this Court.

In **Landis et al. v. The North American Co.**, 299 U. S. 248, at page 256, this Court spoke of cases involving the enforcement of the Public Utility Act as “cases of extraordinary public moment” and, further, “in these holding company act cases, great issues are involved, great in their complexity, great in their significance”; and, further, “on the law there will be novel problems of far-reaching importance to the parties and to the public.”

We respectfully submit that the question of the validity of section 12-H is at least as important and of far more public interest than any of the other sections of the act.

Other federal legislation relating to political contributions has always been expressly limited to federal elections [The Hatch Act, Title 18, U. S. C. A., Secs. 61-61(t), and particularly Sec. 61 (m), 54 Stat. 772, and the federal Corrupt Practices Act, Title 2, U. S. C. A., Secs. 241-256, particularly Sec. 251, 43 Stat. 1074].

The attempt, under Section 12-H, to reach political practices at state and substate elections, certainly presents novel problems of far-reaching importance. Many individuals who are officers and employes of utility corporations like to participate as other citizens do in the elections through which our democracy functions. In view of the provisions of Section 12-H, they now do so at the risk of any contribution or activity they may make or engage in being considered as made or done “by or on behalf of the corporation” and, hence, risk indictment. Surely, this question of the federal power over the citizen’s right to

engage in political activity in state and local matters is one that should be settled by this Court.

Further, the question is one of great importance to the states because, if Congress may, under the commerce power, regulate political practices at state and substate elections, nominations or appointments, then the power is complete, plenary and exclusive—**Gibbons v. Ogden**, 9 Wheat. 1, l. c. 196—and all state legislation in conflict therewith would be invalid. Nearly all of the states now have corrupt practices acts, and it is important to state legislators that they know how far Congress can go in preempting this field.

We say, therefore, that the constitutionality of Section 12-H presents a federal question of great importance which should be settled by this Court.

(b) This case also presents the question of whether or not any part of Section 12-H can be upheld under the doctrine of separability.

It is probably within the power of Congress to prohibit contributions to candidates for federal office—**U. S. v. Classic**, 313 U. S. 299; it may be within the power of Congress to prohibit political contributions by use of the mails or instruments of interstate commerce—**U. S. v. Darby**, 312 U. S. 100. It is not within the power of Congress to prohibit contributions made “otherwise” than by mail to candidates for state and substate offices (**U. S. v. Reese**, 92 U. S. 214, l. c. 217, 218, 221; **James v. Bowman**, 190 U. S. 127, l. c. 139-142; **Lackey v. U. S.**, 107 Fed. [6th Cir.] 114, l. c. 117, 118, 121).

The act contains a separability clause, Sec. 32 (Title 15 U. S. C. A., Sec. 79Z-6). We deny that any part of Section 12-H can be upheld. The presence of a separability clause merely reverses the presumption against divisibility. Notwithstanding the presence of such a clause, the unconstitutional part will not be separated and the bal-

ance sustained when, as in this case, the provisions sought to be stricken out are essential to the legislative purpose, or are so interwoven that the separation of the valid and invalid parts is impractical, or where there is a clear probability that with the invalid part eliminated, Congress would not have been satisfied with what remained (*Williams v. Standard Oil Co.*, 278 U. S. 235, l. c. 241, et seq.; *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, Syll. 4, l. c. 361 et seq.; *Carter v. Carter Coal Co.*, 298 U. S. 238, Syll. 4, l. c. 312, et seq.; *U. S. v. Reese*, 92 U. S. 214, l. c. 221; *Hill v. Wallace*, 259 U. S. 44, l. c. 70, 71). Or where, also as in this case, in eliminating the invalid part, the Court would have to destroy a valid portion of the remainder—*Employers' Liability cases*, 207 U. S. 463, l. c. 500-1.

We shall attempt to demonstrate in our brief that for all of these reasons, the separability clause can not save any part of Section 12-H. We say here, however, that the question is one of great importance and should be settled by this Court, in order that the public, United States Attorneys, and Grand Juries may know what, if any, part of the act is valid, and against whom it may be enforced.

(2) The Court of Appeals Has Decided a Federal Question in a Way That Is Untenable, Against the Weight of Authority, and in Conflict With Applicable Decisions of This Court.

The trial court charged the jury as follows (R. 1187):

“Some of the Government’s evidence has related to the payment of money after February 25, 1937, to persons holding public office at the time of receipt of the money, and the defendants have contended that such payments were not in connection with the candidacies, nominations or elections of such persons, and, thus, not contributions in violation of Section 12-H. It is the Government’s contention that such payments

were in fact made in contemplation of such persons becoming candidates for office and so were in connection with their candidacies, nominations, or elections, and, hence, in violation of section 12-H,"

to which charge petitioner excepted as follows (R. 1195-6):

"I desire to except to that part of the Court's charge where it charged the jury that contributions, although not given to people then candidates for public office, might be considered on the question of guilt and as constituting guilt if the jury find that they were made in contemplation of candidacy. I wish to except to that part."

The case thus presents the question as to whether or not Section 12-H can be enlarged by construction to include offenses not expressed in its terms, to wit: contributions made to persons not at the time candidates, but "in contemplation of such persons becoming candidates for office."

We shall endeavor, in our brief, to point out the error in this instruction, because it is contrary to the general rule that criminal statutes cannot be enlarged by construction to include offenses not clearly expressed in their terms—*St. Louis Merchants Bridge Terminal Ry. Co. v. U. S.*, 188 Fed. 8th Cir. 191, Syll. 2, l. c. 193; *Erbaugh v. U. S.*, 173 Fed. 8th Cir. 433, l. c. 435; *U. S. v. Wiltberger*, 5 Wheat. 76, l. c. 96; 59 C. J. Statutes, Sec. 660, pp. 1115, 1116, note 27—and that such a construction of Section 12-H conflicts with the recent decision of this Court in *Viereck v. U. S.*, 318 U. S. 236.

There, this Court held that a statute requiring foreign agents to file a statement of their activities "as agent of a foreign principal" (l. c. 238), could not be extended by construction to require the agent to file a statement of any activity except "as agent" (l. c. 243), and held reversible error the trial court's charge that "It is sufficient if you

find that he engaged in the activities, whether on behalf of his foreign principal or principals or on his own behalf (l. c. 240)."

And said this Court (l. c. 243):

"We cannot read that phrase as though it had been written 'while an agent' or 'who is an agent.' The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

Section 12-H limits its prohibitions to contributions made in connection with a candidacy, and the fact that the recipient is a candidate, is an essential element of the offense. The trial court's attempt to enlarge it to include contributions made in contemplation of candidacy, presents the same error that was condemned in the Viereck case.

The Court of Appeals avoided a direct decision on this point by construing the instruction as applicable only to counts 2 to 8 of the indictment, on which petitioner was acquitted. We shall point out in our brief, as we did in our petition for rehearing (R. 1273-5), that this is a clear misconception of the record. That the instruction had no connection whatsoever with the offenses charged in counts 2 to 8, and was applicable solely to count 1 charging conspiracy. If, as the Government contends, the act is valid, either in whole or in part, this question of its construction becomes of great public importance and it should be settled by this Court.

**(3) The Circuit Court of Appeals Has Rendered a Decision
in Conflict With the Decisions of Other Circuits, and
Has Decided an Important Question of General
Law in a Way That Is Untenable and in
Conflict With the Weight of Authority.**

If there is one principle that seems to be settled in these conspiracy cases, it is that mere knowledge, presence, acquiescence or approval of the unlawful acts of others is not enough. The Government must go farther and produce substantial evidence that, with such knowledge, the accused intentionally **participated therein**. It was so ruled in the 9th Circuit in *Weniger v. U. S.*, 47 Fed. (2d) 692, l. c. 693; in the 2nd Circuit, in *U. S. v. Potash*, 118 Fed. (2d) 54, syl. 7, l. c. 57; *Marrash v. U. S.*, 168 Fed. 225, syl. 6, l. c. 231; *Lucadamo v. U. S.*, 280 Fed. 653, syl. 2, l. c. 657, paragraphs 2, 3; in the 7th Circuit, in *Turcott v. U. S.*, 21 Fed. (2d) 829, and *Zito v. U. S.*, 64 Fed. (2d) 772, syl. 5, l. c. 775, par. 5; in the 6th Circuit in *Patterson v. U. S.*, 222 Fed. 599, syls. 28, 29, l. c. 631, pars. 28, 29; in the 5th Circuit, in *Young v. U. S.*, 48 Fed. (2d) 26, syl. 3, l. c. 27, 1st column, last paragraph; in the 10th Circuit, in *Bacon v. U. S.*, 127 Fed. (2d) 985, syll. 4, l. c. 987.

The Court of Appeals admits, in its opinion, that the cases above cited support the above rule (R. 1245). The Court of Appeals then proceeds to modify and restate the rule (R. 1246-7) in such a way as to omit the essential element of participation, thus making it possible to convict of crime without proof of any criminal act, and producing a conflict with the decisions of the other circuits in the cases above cited.

In view of the extensive use that is now being made of the conspiracy statute by United States Attorneys in

criminal prosecutions, it would seem to be a matter of great importance and of general public interest that this conflict, as to the essential elements necessary to convict, be settled by this Court.

(4) **Several Questions of General Law Were Decided in a Way That Is Untenable and in Conflict With the Weight of Authority.**

(See, *supra*, specifications of error to be urged, Nos. 3, 4, 5 and 6, and questions presented Nos. 5, 6, 7, and 8.)

These remaining questions are probably not of themselves of enough general importance to warrant certiorari; however, the court below decided them in a way that is untenable and against the weight of authority, and if the writ is granted we wish to argue them as additional grounds for reversal. The impelling reasons for granting the writ are, of course, the important questions of federal law stated *supra* as 1 (a) and (b) and 2, under reasons for granting the writ, and the conflicts of decision pointed out in 3, *supra*.

We submit that the above federal questions at least are all of public importance in the administration of the Act, and ought to be settled by this Court.

Prayer for Writ.

Wherefore, petitioners pray that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the record and all proceed-

ings in the case numbered and entitled on its docket as No. 12,267, Louis H. Egan, Appellant, v. United States of America, Appellee; and that said judgment of the said United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

THOMAS BOND,
Attorney for Petitioner.

